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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. XAVIER LEONARD RODGERS, Defendant and Appellant.	G039439 (Super. Ct. No. 06CF2765) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed in part, reversed in part and remanded.

Jamie L. Popper, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant raises numerous issues on appeal. We reject all but two of them. We agree that since the jury found it not true he was a gang member, count three, which was to be punished as a felony only if there was a true finding he was a gang member, should be punished as a misdemeanor. We also agree he was given too few custody credits. In all other regards, we affirm.

I

FACTS

A jury found defendant Xavier Leonard Rodgers guilty of attempted murder as charged in count one of the information, found it to be true he personally used a firearm during the commission of count one and did not find it to be true he committed count one for the benefit of a criminal street gang. The jury also found him guilty of possession of a firearm by a felon as charged in count two, and carrying a loaded firearm in public as charged in count three, and did not find the gang enhancements on either count two or count three to be true. He was found not guilty of street terrorism as charged in count four. The court sentenced him to state prison for 20 years. He was given credit for 1,007 actual days and 166 conduct days, totaling 1,173 days credit.

Hubert Harbaugh was a door guard at the Boogie Bar in Anaheim on the Saturday night and Sunday morning of December 13 and 14, 2003. At around one o'clock in the morning Harbaugh saw two African-American males being escorted out the door. He said: "They were pretty angry over being kicked out of the club basically. One was more . . . verbal than the other. Using curse language and, you know, kind of — he was just very mad that he was being kicked out." He said defendant was the shorter, stockier man. Harbaugh heard defendant say, "I am a penitentiary nigger cousin."

Regarding what defendant said, Harbaugh related: "He was kind of just, I would assume, venting his anger towards them for making him leave. At one point it was like — it's been a long time since the incident." When asked if defendant challenged someone, Harbaugh said: "It was more so along the lines I think of that he was going to

'F' him up. You know, 'I will "F" you up.' And I remember Long Beach being mentioned and that was about it before they started heading towards the vehicle."

As they walked toward a car, Harbaugh heard defendant tell "the other African-American 'get my shit from the car.'" Harbaugh assumed that was a reference to a weapon, so he circled around the car. He estimated the distance from the door to the parking stalls to be 30 to 40 feet. He "saw the taller, thinner African-American hand something to" defendant, but he couldn't see what it was. Harbaugh said: "He turned around immediately and started to walk back toward the club between the cars. I seen his arms and I heard a cocking of a firearm."

Harbaugh walked behind defendant and "had a suspicion that he had a gun, but . . . didn't actually see it." According to Harbaugh, defendant "wasn't paying . . . attention to me. He was more so focused on the other group of security that was still over by the door." Defendant was "exceptionally angry and yelling," he was saying something to the group, but Harbaugh did not hear what was said. Harbaugh said he got within 10 feet of defendant when defendant "reached his hand into his pocket and I seen a handle of a gun." He yelled "gun" and rushed defendant and "took him to the ground."

Harbaugh further explained: "I kind of tried to pull the, like, pocket and gun right off his pants to keep him from fully getting to the gun because he had his hand, like, right in his pocket on it. As soon as I seen the handle I sprung and tried to prevent him pulling it out." He added: "I grabbed his hand and the pocket and the gun. I tried to yank it off at first and I couldn't, so I grabbed my other arm and took him down to the ground. At that time he actually got the gun out of his pocket, but he didn't have it like this. He kind of grabbed it like this so that he couldn't —." The judge then added: "Gesturing with his thumb and fingers together on the — on the gun rather than as a grip." When Harbaugh and defendant were on the ground, another security guard took the gun.

Jay Aikins was also a security guard at the Boogie Bar. He asked defendant three times to step back from the restricted area, a five-foot perimeter around the dancing and disc jockey area. Defendant had a drink in his hand and smelled of alcohol. Aikins said: "After I had told him numerous times and I had to — I had explained to him why he had to be back, then he had an attitude like I don't have to go anywhere so — and he also said something to that effect. I don't recall exactly what he said, but he said something to that effect. And after that then what our procedure is, to do is never escort anybody by yourself generally because you don't know who they're with, you don't know what kind of weapons they may have or have gotten in within the club. [¶] You realize this is a club that had 2500 young adults between 18 and on up. So what I did, I gathered up two of my security guards and at that point we attempted to escort Mr. Rodgers outside the club." Defendant was yelling that he wasn't going anywhere. The guards "had to physically remove him."

Once outside, the guards let defendant go. Defendant was angry and upset and ripped off his shirt. There were tattoos on his arms. Defendant whispered something to his friend. According to Aikins, defendant was "right in his face," and from his stance and body movements, "was ready to fight."

At that point, defendant paced back and forth. Then his friend came back. Defendant had his hand near his back. Harbaugh then yelled out "gun."

Chris Dray was head of security at the Boogie Bar. He was observing defendant outside the club. He told one of the other guards to "watch it" because it "looked like he was handed something." Dray said when Harbaugh grabbed defendant, a pistol was in defendant's right hand. Dray "grabbed the pistol and walked to the side."

Nocoby Davis, defendant's cousin, accompanied defendant to the Boogie Bar. Davis said he went to the car and got a gun. Anaheim Police Officer Gregory Lawson related a conversation he had with Davis about the incident: "Tempers were escalating and that they just were, you know, they was getting closer and closer to a fight.

[¶] . . . [¶] He said that he walked over to Mr. Rodgers' vehicle which was parked in the parking lot." Davis told Lawson that defendant yelled, "Hand me the gun. Hand me the gun." Lawson said, "Mr. Davis was able to gain access into the car and he removed a firearm from a compartment which was located directly above the window and door panel, control panel on the passenger side." Davis gave the gun to defendant. Lawson continued relating what Davis told him: "Upon giving it to him, he observed Mr. Rodgers take the slide back on the weapon and chamber a round into the chamber."

In the trial court, the prosecutor filed a brief under Evidence Code section 1101, subdivision (b), stating defendant's prior "is highly probative of his intent during the charged incident." The brief states: "In both the prior incident and the charged incident, Defendant was intoxicated. In both the prior incident and the charged incident, the Defendant retrieved a gun. In the prior incident, the Defendant pulled the gun out and shot the victim. In the charged incident, the Defendant was in the process of pulling the gun out of his pocket after he had chambered a round and while he was approaching his intended victim. The prior incident sheds light on the Defendant's intent in the charged incident." The brief sums up the argument:

"**Since,** in 1994, (Drunk) + (Angry) + (Gun from car) = **shoot**,

Then, in 2002, (Drunk) + (Angry) + (Gun from car) = **intent to shoot**."

For that prior shooting, defendant was charged with attempted murder, but convicted of assault with a deadly weapon.

The trial court ruled the evidence was admissible. At trial, Long Beach Police Detective Karl Movchan testified he investigated an October 28, 1994, shooting in Long Beach in which the victim was shot in the face. When Movchan questioned defendant about it, defendant told him he would not shoot one of his homies.

There was evidence defendant had been drinking, was very mad at the victim and was yelling at him. The victim drove away and defendant spent the next two

hours searching for him and getting more and more angry. When the victim returned, defendant got a gun from his vehicle, pointed it at the victim's face and shot him.

At the conclusion of Movchan's testimony, the court stated: "Hang on a second. I want to do something with regard — I want to remind the jury, remember in our voir dire I told you some things you got to compartmentalize, limited purpose? There is an instruction I will give you in more detail in the end with regard to this other incident in '94. . . . [¶] Now, the court allows certain evidence to be used for purposes of proving intent. You cannot use it to prove the defendant has a bad character, he's got a certain kind of character, he's more likely to have committed this particular offense. So that purpose I want to read this instruction to you now, read it more detail later. With regard to that evidence about that incident in '94 the People have presented evidence of other behavior by the defendant that is not charged in this case and that was the defendant was involved in an incident where another person was shot. You may consider the evidence only if the People are able to prove it by a preponderance of evidence that the defendant in fact committed that uncharged offense." The court went on with a lengthy description of what proof by a preponderance of evidence means. The court then admonished the jury: "And if you conclude the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of the charged attempt murder. People must still prove each element of the charge beyond a reasonable doubt." At the conclusion of the evidence, the court again instructed the jury regarding the evidence of the 1994 incident and how it was to be used for a limited purpose. At that time, the court stated in part: "If you decide that the defendant committed the uncharged offense, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant acted with the intent to kill in this case. [¶] In evaluating this evidence, consider the similarity, or lack of similarity between the uncharged offense and the charged offense. [¶] Do not consider this evidence for any

purpose except for the limited purpose of determining the . . . defendant's intent. [¶] Do not conclude from this evidence the defendant is a person of bad character or is disposed to commit the crime. [¶] If you [do] conclude the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove the defendant was guilty of attempted murder, or the lesser offense of attempted . . . voluntary manslaughter. The People still must prove each element of the charge beyond a reasonable doubt."

Abel Morales, another Long Beach police officer, testified as a gang expert. According to Morales, the Long Beach Insane Crips is a criminal street gang, and is "one of the biggest black gangs in the City of Long Beach. One of the most vicious ones in our city." Morales said defendant had several monikers: BK, Bad Kid, Dan, Dangerous Dan, Dan Dog, Bad Kid Dan and Dangerous Dan Dog. He said a tattoo on defendant's arm demonstrates he served time in prison, and that another tattoo signifies 21st Street where "you most likely find Insane Crip gang members." Other tattoos on defendant also showed significance vis-à-vis Long Beach Insane Crips. Morales said the kind of graffiti defendant has on his body is common among "hardcore" gang members, "the ones that are capable of doing vicious crimes." Morales said defendant told the police he had been a member of the Crips since he was in the fourth grade.

About the 1994 shooting, Morales said defendant identified himself as being a member of the Insane Crips. Morales said the incident shows that defendant "is hardcore, that he doesn't care who he hurts, even hurts his so-called own friends. He doesn't care about being identified or anything to the police."

About the present incident, Morales was asked by the prosecutor: "What about the facts of this case have significance to you as a gang detective in putting together an opinion as to Mr. Rodgers' gang status?" Morales responded: "That he is out of the City of Long Beach, the fact that he got disrespected in front of a lot of people, the fact that he was with a relative or a friend who knew that he was a gang member, and by

him not doing anything about him being disrespected it would show a sign of weakness, so therefore he had to go and do whatever it is that he had to do to prove that, you know, he wasn't going to back down."

II

DISCUSSION

Sufficiency of evidence

Defendant contends there was insufficient evidence to support his attempted murder conviction. The Attorney General responds that there was sufficient evidence of a specific, express intent to kill.

In addressing challenges to the sufficiency of evidence, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

The intent required for attempted murder is "'the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) "'There is rarely direct

evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.' [Citation.]" (*Id.* at p. 741.)

In *Smith*, the defendant was acquainted with the mother of a baby, had exchanged words with her and called her a "bitch" moments before he fired a single shot at the mother's fleeing vehicle, occupied by a male passenger and the baby in a rear-facing car seat directly behind the mother who was driving. The bullet shattered the rear windshield, narrowly missed both the female driver and the baby, passed through the driver's headrest, and lodged in the driver's side door. The defendant was convicted of the attempted murder of the driver and the baby. (*People v. Smith, supra,* 37 Cal.4th at pp. 736-738, 741.)

On appeal, the defendant argued that there was only proof of his specific intent to kill the female driver, but no proof of his specific intent to kill the baby. (*People v. Smith, supra,* 37 Cal.4th at pp. 736, 738.) The Supreme Court rejected the argument, explaining: "We first consider the mental state required for conviction of attempted murder. 'The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citations.]' [Citation.] In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.] Hence, in order for defendant to be convicted of the attempted murder of the baby, the prosecution had to prove he acted with specific intent to kill that victim. [Citation.]" (*Id.* at p. 739.) The court said that "evidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both. [Citations.]" (*Id.* at p. 743.)

In *People v. Morales* (1992) 5 Cal.App.4th 917, the defendant was heard saying he was going "to get" the victim. The defendant came home and loaded a gun; he then got into his car. The police were called. The defendant was found in an alcove under an overhang of the victim's house. When the police grabbed the defendant, they found a gun inside his sleeve "in a position to slide down towards the defendant's hand when he dropped his arm." (*Id*. at pp. 921-922.) The defendant claimed there was insufficient evidence to support his conviction of attempted murder. The court found there was sufficient evidence: "[D]efendant not only threatened to get [the victim] twice, he went home, loaded his gun, drove to the victim's neighborhood, and finally hid in a position that would give him a clear shot at [the victim] if [the victim] left by the front door." (*Id*. at pp. 926-927.)

Here, defendant was angry. He appeared to be ready to fight. He ordered his cousin to get a gun from his vehicle, and paced back and forth until he was handed the gun. As soon as his cousin handed him the gun, he chambered a round, and angrily walked toward where the guards were standing. At that point he was tackled to the ground, and the gun was in defendant's right hand when it was taken away from him.

In *People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, the defendant was also charged with attempted murder based on his attempt to hire an undercover police detective, posing as a hired killer, to murder the defendant's sister and her friend. (*Id.* at p. 4.) The Supreme Court found a direct but ineffectual act toward accomplishing the intended killings in the defendant's securing an agreement with the undercover detective and making a down payment. (*Id.* at pp. 8-9.)

The facts in the instant case are similar to those in *People v. Superior Court* (*Decker*), *supra*, 41 Cal.4th 1, *People v. Smith*, *supra*, 37 Cal.4th 733 and *People v. Morales*, *supra*, 5 Cal.App.4th 917. Just as in *Decker*, defendant never pointed a gun at his intended victim; but his actions of threatening Aikins, ordering that his gun be brought to him, pacing back and forth in a rage while he awaited his gun, chambering a

round and reaching for his gun, amounted to a direct but ineffectual act toward accomplishing the intended killing. And just as the defendant in the *Smith* case targeted both a mother and her baby, defendant targeted Aikins as well as the group of security guards. Defendant verbally threatened Aikins and then armed himself with a gun just as the defendant in *Morales* verbally threatened his victim and then armed himself with a gun. In the instant case, defendant cocked his gun and kept it within easy reach; in *Morales*, the defendant secreted his gun in his sleeve for easy access when he extended his arm.

In committing a prior crime, defendant had also been drinking, was also angry and also armed himself with a gun. In the prior incident, however, no one prevented defendant from shooting the gun, and he shot the victim in the face. The jury in this case was able to consider that evidence to decide whether or not he intended to murder the victim here. Under these circumstances, we conclude there is sufficient evidence to support defendant's conviction for attempted murder.

Prior crime

Defendant next argues the trial court erred in permitting the jury to consider evidence of the 1994 crime under Evidence Code section 1101. Defendant argues the court "should have excluded the prior because its consideration to prove intent also meant its impermissible consideration to prove [defendant's] ambiguous actions in somehow causing the gun in his pocket to move slightly was a direct but ineffectual act toward attempted murder."

Evidence Code section 1101 precludes the admission of evidence of uncharged crimes when offered to show nothing more than bad character or a propensity for criminality. But that section further provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan,

knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Intent requires the least degree of similarity between the charged crime and uncharged incident. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) "Admission of Evidence Code section 1101, subdivision (b) evidence is addressed to the sound discretion of the trial court. The trial court may exclude or admit this type of evidence pursuant to Evidence Code section 352 which provides: 'The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' The trial court's determination will not be disturbed on appeal absent a clear showing of an abuse of discretion. [Citations.]" (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609-1610.)

"On appeal, a trial court's ruling under Evidence Code sections 1101 and 352 is reviewed for abuse of discretion. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

In both the prior incident and the present one, defendant had been drinking and became angry over something his intended victims did. In the prior one, he spent two hours searching for the person who made him angry; in the present one, he paced back and forth yelling and cursing while he waited for his gun. In both, he kept his gun in his car. In the first case, he shot the victim. In the second, he chambered a round into his gun, reached for it, and appeared to be preparing to shoot before he was thwarted by a security guard. The evidence supports an inference he would have shot into the security guards had Harbaugh not prevented him from doing so.

The court weighed the probative value of the evidence against its prejudicial effect and determined the evidence was admissible. It then carefully

instructed the jury the prosecution's burden was not lessened if it decided by a preponderance of the evidence that defendant committed the 1994 crime. The court also cautioned the jury that, should it find defendant committed the 1994 crime, it was to consider that evidence only for the limited purpose of whether or not he intended to commit the instant crime. Under these circumstances, we cannot conclude the trial court abused its discretion.

Motion for new trial

Defendant contends the court applied the wrong standard when it denied his motion for new trial. The trial court gave a lengthy oral statement after hearing arguments on defendant's motion for new trial. The court concluded: "So the court's going to deny the motion finding there is sufficient evidence and in this matter to sustain an appeal on this matter. Albeit I will say that there are some skinny parts to it I think there is enough."

"In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.] [¶] A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. "'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'" [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 523-524.)

"We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard. [Citation.]" (*People v. Navarette* (2003) 30

Cal.4th 458, 526.) No manifest and unmistakable abuse of discretion appears in the record before us. Here the trial court articulated its reasons. The court stated, "But the court does reweigh the evidence, examine it in light of the law." It understood its discretion and exercised it. Under the circumstances in the record before us, we cannot conclude the trial court abused its discretion.

CALCRIM 600

Defendant next contends CALCRIM No. 600[1] erroneously instructed the jury "to find an intent to kill if they found a direct step toward murder; it suggested jurors could stop their analysis upon finding a direct step, without finding an intent to kill." The specific words in the instruction to which defendant is particularly concerned are: "A direct step *indicates* a definite and unambiguous intent to kill." He says these words eliminate the element of intent to kill.

"Trial courts only have a sua sponte duty to instruct on 'the general principles of law relevant to and governing the case.' [Citation.] 'That obligation

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[1] The jury was instructed on CALCRIM No. 600 as follows: "The defendant is charged in Count I with attempted murder. [¶] To prove the defendant guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffectual step towards killing another person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his plan or his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement towards the commission of the crime after the preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step towards killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by somebody or something beyond his or her control. On the other hand, if the person freely and voluntarily abandons his or her plans before taking a direct step towards committing the murder, then that person is not guilty of attempted murder."

includes instructions on all of the elements of a charged offense' [citation], and on recognized 'defenses . . . and on the relationship of these defenses to the elements of the charged offense.' [Citations.]" (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.)

The instruction clearly informed the jury that two elements were required before they could convict defendant of attempted murder: a direct but ineffective step toward killing another person and an intent to kill that person. The trial court correctly instructed the jury on the elements of the charged crime. We find no error.

Gang evidence

Defendant argues the admission of gang evidence undermined his due process rights. The Attorney General responds that gang evidence was properly admitted because it related to both the gang enhancements and the gang offense. Here the jury found the gang enhancements not to be true and returned a not guilty verdict on the charge of street terrorism.

Gang evidence should not be admitted if its probative value is outweighed by the potential for prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) In *People v. Albarran* (2007) 149 Cal.App.4th 214, the reviewing court found the People failed to present sufficient evidence the crimes were gang motivated, and that, given the inflammatory nature of the gang evidence, the error was not harmless. (*Id.* at p. 232.)

Unlike the facts in *Albarran*, there were facts here from which a jury could have connected the incident to gang activity. Defendant opened his shirt to reveal gang tattoos. He told the guards he had been to the penitentiary. He said something about Long Beach, while the name of his gang was the Long Beach Insane Crips. He went to the night club with another gang member. Under these circumstances, we cannot conclude the court abused its discretion when it permitted gang evidence to be introduced.

Cumulative Error

Defendant contends a combination of errors rendered his trial fundamentally unfair. We have individually considered each claim of error. We find no deprivation of rights guaranteed under either the state or federal Constitutions. Defendant was entitled to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) He received a fair trial.

Firearm enhancement

Defendant next contends there was insufficient evidence to support the firearm enhancement under Penal Code section 12022.53. (All further statutory references are to the Penal Code.) As noted above, the information alleged defendant personally used a firearm in committing the crime of attempted murder, and the jury found the allegation to be true.

It is not necessary that a victim see a gun in order for a personal gun use allegation to be properly found true. (*People. v. Granado* (1996) 49 Cal.App.4th 317, 326.) Here defendant was angry and shouting threats. He solicited his cousin's help to get the weapon from the car. Defendant was seen placing the firearm in his pocket. When he was tackled to the ground, it was found in his right hand. Under these circumstances, we find the evidence sufficient to support the jury's finding.

Lesser included arming enhancement

Defendant claims section 12022, attempting or committing a felony while armed, is a lesser included crime of section 12022.53. He says the trial court erred in not instructing on it.

The same argument was rejected in *People v. Majors* (1998) 18 Cal.4th 385: "Assuming arguendo the evidence supported this theory, an issue we need not decide, we decline defendant's invitation to extend a trial court's sua sponte obligation to

instruct on lesser included *offenses* to so-called 'lesser included enhancements.' One of the primary reasons for requiring instructions on lesser included offenses is '"to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between [guilt] and innocence"'— that is, to eliminate '"the risk that the jury will convict . . . simply to avoid setting the defendant free."' [Citation.] This risk is wholly absent with respect to enhancements, which a jury does not even consider unless it has already convicted defendant of the underlying substantive offenses." (*Id.* at p. 410.)

Count three

Defendant argues his conviction on count three should be redesignated a misdemeanor. He says: "Because the jury only found [defendant] guilty of violation of section 12031, subdivision (a)(1), based on the simple elements of section 12031, subdivision (a)(1), and nothing more, the jury in fact found [defendant] guilty of a misdemeanor."

The information states: "Count 3: On or about December 14, 2003, in violation of Section 12031(a)(1)/(a)(2)(C) of the Penal Code (GANG MEMBER CARRYING A LOADED FIREARM IN PUBLIC), a FELONY, XAVIER LEONARD RODGERS, who was an active participant in a criminal street gang within the meaning of Penal Code section 186.22(a), did unlawfully carry in a vehicle a loaded firearm in a public place and on a public street." The jury found defendant not guilty of violating section 12031, subdivision (a)(1), carrying a loaded firearm in public. At the same time, the jury found the enhancement not to be true: "We the Jury in the above-entitled action DO NOT FIND IT TO BE TRUE that the Defendant, XAVIER LEONARD RODGERS, was an active participant in a criminal street gang as defined in Penal Code 186.22(a) while carrying a loaded firearm in public, as alleged in Count 3 of the Information."

The relevant part of section 12031 reads: "(a)(1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory. [¶] (2) Carrying a loaded firearm in violation of this section is punishable, as follows: [¶] . . . [¶] (C) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony."

The Attorney General concedes the jury returned a not true finding under section 12031, subdivision (a)(2)(C) of the statute, but points to another uncharged portion of the statute which might prove fertile ground for holding defendant on a felony: "However, subdivision (a)(2)(D) makes it a felony where the person is not in lawful possession of the firearm, as defined in this section, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare an Institutions Code."

"'It is fundamental that "When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Citation.]" [Citation.]' [Citation.]" (*People v. Parks* (2004) 118 Cal.App.4th 1, 5-6.)

Here, neither party argues section 12031, subdivision (a)(2)(D) is necessarily included in the charged crime, and both agree it was not charged in the information. Accordingly, we order the abstract of judgment amended to reflect a misdemeanor conviction, and not a felony conviction or gang offense, on count three.

Custody credits

Both sides agree the abstract of judgment incorrectly reflects the number of custody credits, and that the correct number is 1107 days of custody credit. We accept their agreement and order that a correction be made on the abstract of judgment.

III

DISPOSITION

The above described corrections to the abstract of judgment are ordered. With the exception of count three, which is a misdemeanor and not a felony conviction, the judgment is affirmed. The matter is remanded to the trial court for resentencing and corrections to the abstract of judgment.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.